

SERVED: December 19, 2000

NTSB Order No. EA-4870

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of December, 2000

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15885
v.)	
)	
ANDREA MASTROGIOVANNI,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge William A. Pope, II, rendered after an evidentiary hearing held on May 23, 2000.¹ By that decision, the law judge affirmed the Administrator's Emergency Order of

¹ An excerpt from the hearing transcript containing the law judge's initial decision is attached.

Revocation ("EOR")² of all of respondent's airman certificates, including his commercial pilot certificate, for violations of sections 119.5(g), 135.293(a), 135.293(b), and 135.299(a) of the Federal Aviation Regulations ("FARs").³ We deny the appeal.

The Administrator's EOR alleged that respondent previously held a Part 135 operator certificate -- Air Carrier Certificate No. UULA425U, issued to Andrea Mastrogiovanni d/b/a Elba Air Aircraft Charter Services -- but that respondent surrendered it to the FAA on August 26, 1998.⁴ Nevertheless, according to the EOR, respondent continued after surrender of his operator certificate to serve as pilot-in-command and conduct charter flights under the auspices of Elba Air Aircraft Charter Services.⁵

At the hearing, the Administrator produced three witnesses: Mark Moberg, President of Leading Edge Aviation Services, a

² Respondent waived the accelerated procedures set forth in 49 C.F.R. §§ 821.54-57.

³ The FARs are set forth in Appendix A. The Administrator's EOR also charged respondent with violating FAR sections 119.5(k) and 135.343, but those charges were dismissed by the law judge and the Administrator did not file a cross-appeal.

⁴ The record indicates that respondent surrendered his certificate to Elba Air Aircraft Charter Services' Principal Operations Inspector ("POI") after respondent, the sole pilot and owner of Elba Air Aircraft Charter Services, failed to satisfactorily pass several required Part 135 competency checks and, as the result of a 709-check ride, had his air transport pilot certificate downgraded to a commercial pilot certificate.

⁵ The record indicates that Elba Air Aircraft Charter Services had, prior to revocation of its operating certificate, only one pilot, which was respondent, and one aircraft, N624ME.

Tampa, Florida-based Fixed Base Operator ("FBO"); Leigh Evans, customer service manager for Dolphin Aviation, a Sarasota, Florida-based FBO; and Stephen Hull, the FAA POI assigned to the former Elba Air Aircraft Charter Services. Mr. Moberg and Ms. Evans both testified that respondent and Elba Air Aircraft Charter Services were known to them as "Elba Air," and that they occasionally brokered charter flights to Elba Air Aircraft Charter Services.⁶ Mr. Moberg identified Leading Edge business records indicating that Leading Edge arranged a charter flight through Elba Air Aircraft Charter Services for a customer on December 12, 1998, and that respondent was paid for this flight.⁷ Similarly, Ms. Evans testified that Dolphin Aviation arranged several charter flights for customers through Elba Air Aircraft Charter Services, and that respondent was paid by Dolphin Aviation for these flights. Ms. Evans also identified Dolphin Aviation business records, including an "Elba Air" invoice for a flight conducted on December 30, 1998, and "Elba Air Leasing Inc." invoices for flights conducted on April 1, 15, 21, and 29, 1999. The invoices were all signed by respondent. Ms. Evans

⁶ Both Mr. Moberg and Ms. Evans testified that Leading Edge and Dolphin Aviation utilized the services of Elba Air Aircraft Charter Services prior to the loss of its operating certificate, and neither was aware in their subsequent dealings with respondent that Elba Air Aircraft Charter Services was no longer a legitimate Part 135 operator.

⁷ The customer for the December 12 charter flight paid \$1,550 to Leading Edge for the charter flight. See Exhibits A-4 and A-5. Respondent, who bases his aircraft at the same airport where Leading Edge is based, received from Leading Edge a credit of \$1,550 to his account on December 14, 1998. See Exhibit A-6.

also identified copies of checks issued by Dolphin Aviation to "Elba Air Charter" in the amounts of \$960 and \$1,090, respectively, for the December 30 and April 1 flights; to "Elba Air Inc" in the amount of \$1,350 for the April 15 flight; and to "Elba Air" in the amount of \$2,900 for the April 21 and 29 flights. See Exhibits A-8 through A-15. Respondent did not testify and did not introduce any exhibits.

The law judge found the testimony of the Administrator's witnesses to be credible, and concluded that it, and the records they furnished, "clearly show that Elba Air conducted at least six charter flights ... transporting passengers for hire" and that "Elba Air never had any existence separate from respondent[.]"⁸ Initial Decision ("ID") at 189-190. The law judge also found that respondent "knew he was transporting passengers for hire, for which he needed, but did not have, a Part 135 certificate." ID at 191. Accordingly, after finding that respondent's conduct demonstrated a "lack of compliance disposition," the law judge upheld revocation of respondent's airman certificates.

On appeal, respondent argues that the Administrator failed to establish a prima facie case that respondent acted as pilot-in-command of the charter flights, exercised operational control over the flights, or that the charter flights were conducted by Elba Air Aircraft Charter Services, and, therefore, that the law

⁸ See Administrator v. Smith, 5 NTSB 1560, 1563 (1987) (credibility findings will not be disturbed absent clear error).

judge committed prejudicial error in denying his motion to dismiss at the conclusion of the Administrator's case.⁹ Respondent's arguments in this regard place undue reliance on semantics, are not in accordance with precedent, and, at times, ignore portions of the record.¹⁰ To be sure, the Administrator presented a prima facie case, and, having not presented any evidence in support of the arguments now advanced, respondent cannot argue that the record does not support the law judge's conclusion that he operated, as both principal and pilot-in-command, the charter flights in question. See, e.g., Administrator v. Owens, 4 NTSB 907, 909 (1983), aff'd, 734 F.2d 399 (8th Cir. 1984) ("the Board deals with the issue of pilot identity on a case by case basis and ... each must be decided on its own unique set of circumstances"); Cf. Administrator v. Kato, 4 NTSB 656, 658 (1982) (flight plan filed in respondent's name for aircraft owned by company headed by respondent created a

⁹ Respondent also attacks the law judge's decision to admit several of the exhibits at the hearing, but these arguments are unavailing. These documents were relevant business records, adequately sponsored by the witnesses, and there is no indication that the law judge gave them anything but their appropriate weight in considering their circumstantial evidentiary value.

¹⁰ For example, contrary to respondent's arguments, the record does show a connection between respondent and "Elba Air Leasing, Inc." Aside from the fact that these invoices were submitted and signed by respondent, the same address also appears on the "Elba Air" invoice signed and submitted to Dolphin Aviation by respondent, and the Administrator's witnesses testified that respondent and Elba Air Aircraft Charter Services were both known in the community as simply Elba Air. See also Exhibits A-17 through A-19 (FAA Part 135 Airman Competency/Proficiency Check forms listing respondent's name, aircraft registration number (N624ME), and, "Elba Air").

reasonable inference that respondent operated the aircraft). There is no evidence to suggest that there is any other operator in southwestern Florida with a name similar to Elba Air, and respondent was the principal and sole pilot associated with the former Elba Air Aircraft Charter Services, and so, despite the slight permutations on the name Elba Air found in the various exhibits, it is a reasonable inference to conclude that these documents reflect charter flights attributable to respondent as both operator and pilot-in-command. See also Tr. at 35 (Mr. Moberg testifying that respondent "had Elba Air on the side of his airplane and he'd always been a charter operator at the Vandenberg Airport") and Tr. at 45-49 (Ms. Evans testifying that when she arranged charter flights with Elba Air Aircraft Charter Services, she would always communicate with respondent or respondent's wife, and that she observed respondent at Dolphin Aviation for the April 29, 1999, flight). After reviewing the entire record, we find no error in the law judge's findings or conclusions.¹¹

¹¹ Respondent also argues that the sanction of revocation is not appropriate in this case, pointing out other instances where suspensions were imposed for unauthorized Part 135 flights. The law judge affirmed revocation based on his finding that respondent exhibited a non-compliance disposition. We see no error in this regard. Respondent clearly knew or should have known -- as a consequence of the recent revocation of his ATP certificate and Elba Air Aircraft Charter Services' Part 135 operating certificate -- that neither he nor his charter company was authorized to conduct passenger-carrying charter flights, but he nonetheless continued to do so. See, e.g., Administrator v. Bennett, NTSB Order No. EA-4762 at 3 (1999) (demonstrated non-compliance disposition is, in and of itself, a basis for revocation).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The Administrator's Emergency Order of Revocation is affirmed.

HALL, Acting Chairman, HAMMERSCHMIDT, GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.

Appendix A

FAR section 119.5, 14 C.F.R. Part 119, provides, in part, as follows:

Sec. 119.5 Certifications, authorizations, and prohibitions.

* * * * *

(g) No person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications. No person may operate as a direct air carrier or as a commercial operator in violation of any deviation or exemption authority, if issued to that person or that person's representative.

* * * * *

FAR sections 135.293 and 135.299, 14 C.F.R. Part 135, provide, in part, as follows:

Sec. 135.293 Initial and recurrent pilot testing requirements.

(a) No certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas--

(1) The appropriate provisions of Parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;

(3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;

(4) Navigation and use of air navigation aids

appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;

(5) Air traffic control procedures, including IFR procedures when applicable;

(6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;

(7) Procedures for--

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and

(iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

(8) New equipment, procedures, or techniques, as appropriate.

(b) No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft. The extent of the competency check shall be determined by the Administrator or authorized check pilot conducting the competency check. The competency check may include any of the maneuvers and procedures currently required for the original issuance of the particular pilot certificate required for the operations authorized and appropriate to the category, class and type of aircraft involved. For the purposes of this paragraph, type, as to an airplane, means any one of a group of airplanes determined by the Administrator to have a similar means of propulsion, the same manufacturer, and no significantly different handling or flight characteristics. For the

purposes of this paragraph, type, as to a helicopter, means a basic make and model.

* * * * *

Sec. 135.299 Pilot in command: Line checks: Routes and airports.

(a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly. . . .

* * * * *